OPINION ENTERED: DECEMBER 7, 2011

CLAIM NO. 200873265

EAST KENTUCKY CARPET CENTER, INC. PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

MARVIN HOLLINS
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, COWDEN and STIVERS, Members.

STIVERS, Member. East Kentucky Carpet Center, Inc. ("Carpet Center") appeals the June 27, 2011, opinion, order, and award rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ") in which the ALJ, in ruling upon Marvin Hollins' ("Hollins") motion to reopen alleging a worsening of condition, concluded Hollins is permanently totally

disabled. Carpet Center filed a petition for reconsideration asserting the evidence the ALJ relied upon in determining Hollins is now permanently totally disabled does not comprise "objective medical evidence" as required by KRS 342.125. Carpet Center also appeals from the August 2, 2011, order denying its petition for reconsideration. On appeal, Carpet Center asserts, in part, as follows:

> Pursuant to KRS 342.125, in order to prevail on a reopening for an increase in occupational disability since a prior award, the claimant must establish a 'Change of disability as shown by objective medical evidence of worsening...of impairment due to a condition caused by the injury since the date of the award or order.' (KRS 342.125). A worker's subjective complaints are insufficient to satisfy the standard of an objective medical finding. A worker must establish evidence of an injury by objective medical findings and evidence of a worsening of condition on reopening requires no less. [citations omitted]. While a workers' subjective complaints may support a valid medical diagnosis, they do not constitute objective medical findings. [citation omitted].

A brief recitation of the litigation history is necessary. Hollins' Form 101 alleges separate injuries to his back on February 7, 2008, and October 14, 2008. The Form 101 reflects his injuries occurred as follows: "2/7/08- Moving a countertop out of a house and hurt back;

10/14/08- Carrying a 350 pound grinder to a porch and hurt back." The record indicates Dr. James R. Bean performed L5-S1 fusion surgery on May 8, 2009. Hollins was deposed on June 1, 2009, and testified he intended to go back to work if he started feeling better. *Hollins' brief to the ALJ, dated October 7, 2009, reveals Hollins was seeking permanent partial disability ("PPD") benefits and not permanent total disability ("PTD") benefits.*

In the November 3, 2009, opinion, award, and order, Administrative Law Judge, Hon. R. Scott Borders ("ALJ Borders"), relied upon the 20% functional impairment rating assessed by Dr. James Bean. ALJ Borders' summary of Dr. Bean's treatment, opinions and impairment rating, in part, is set forth below:

> Dr. Bean saw the Plaintiff again on April 13, 2009, with continuing problems at work. He was also advised of the April 14, 2008 [sic], lifting incident that put him off work altogether. Dr. Bean once again diagnosed him as having symptomatic spondylolisthesis at L5-S1 and recommended fusion surgery which was performed on May 8, 2009. Dr. Bean opined that he was continuing to treat the Plaintiff who would not reach maximum medical improvement until one year from his surgery or May, 2010.
>
> Dr. Bean testified that he could return to sedentary work, but is restricted from returning to work as a flooring installer. Dr. Bean opined the

> Plaintiff would be entitled to a 20% functional impairment rating, pursuant to the Fifth Edition of the AMA Guides, as a result of the surgical procedure. He felt comfortable in assessing the impairment even though the Plaintiff had not achieved maximum medical improvement. Dr. Bean was asked to apportion the rating between the first incident of back pain and whatever occurred on October of 2008. He said it is an arbitrary assignment that he would assess 50% to each incident.

ALJ Borders further determined as follows:

> In addition, based on the restrictions imposed by Dr. Hoskins, as well as, [sic] those imposed by Dr. Bean, the Administrative Law Judge finds the Plaintiff does not retain the physical capacity to return to the type of work he was performing at the time of his injury. Therefore, he shall be entitled to application of the three-time statutory multipliers which is enhanced by 2/10 due to the Plaintiff having less than 12 years of education or a GED.

Carpet Center appealed the November 3, 2009, opinion, award, and order on an issue relating to the payment of temporary total disability ("TTD") benefits. This Board affirmed in an opinion entered April 27, 2010.

Hollins filed a Motion to Reopen on November 10, 2010, asserting his condition has worsened and he is now permanently totally disabled. Attached to the Motion to Reopen is Hollins' affidavit and a sworn recorded statement by Dr. Bean. By order dated November 29, 2010, Hollins'

Motion to Reopen was sustained by the Chief Administrative Law Judge to the extent the matter would be assigned to an ALJ for an adjudication on the merits.

Regarding Hollins' alleged worsening of condition, in the June 27, 2011, opinion, order, and award, the ALJ determined as follows:

> The only issue in this reopening is whether plaintiff's condition has worsened and, if so, the extent of his current impairment/disability. Plaintiff relies on his own testimony and the opinions of Drs. Bean and Johnson to argue his condition has worsened to the point he is now totally disabled. Conversely, the employer relied on Dr. Primm and its vocational expert, Ralph Crystal, to argue plaintiff's condition has not worsened and, in any event, he is not now permanently and totally disabled.
>
> In this reopening, competent evidence obviously exists for each party's position. However, considering the totality of evidence, the Administrative Law Judge is ultimately persuaded by the combined evidence from Dr. Bean, Dr. Johnson and plaintiff that his condition has worsened and he is now precluded from returning to any gainful employment on a regular and sustained basis. In reaching this conclusion, plaintiff's own testimony was found especially persuasive, as was the opinion of the treating surgeon, Dr. Bean. As the treating physician, Dr. Bean is found to be best suited in this case to opine as to plaintiff's change in condition and his ongoing symptoms. Although he testified plaintiff could probably return to

> light duty work, he allowed plaintiff would likely have intermittent flare-ups that would impact his performance and attendance.
>
> Moreover, plaintiff has only a 9th grade education, is not very literate, and his work history is not especially compatible with most light duty positions. Plaintiff's testimony as to his current symptoms and level of functioning is found more persuasive in that regard than the contrary opinions of Dr. Primm and Ralph Crystal. In the original litigation, plaintiff indicated he intended to attempt to return to work when he fully recovered from his surgery. He has now recovered but now testified he is not able to return to that kind of work as a carpet installer or any of his other employment. Plaintiff appeared as a credible witness and the Administrative Law Judge is persuaded plaintiff would return to work if he were able.
>
> For these reasons, it is determined plaintiff is now permanently and totally disabled due to the worsening of his condition....

Pursuant to KRS 342.125(1)(d), in a motion to reopen alleging a worsening in disability, the worsening must be shown by "objective medical evidence of worsening…of impairment due to a condition caused by the injury since the date of the award or order." In Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2007), the Supreme Court of Kentucky discussed at length the requirements of KRS 342.125(1)(d) in proving a worsening of

impairment. Noting that nothing in the statute refers to the "Guides, to permanent impairment rating, or to permanent disability rating," the Supreme Court concluded a greater impairment rating, while certainly objective medical evidence, is not the only objective medical evidence "by which the statute permits a worsening of impairment to be shown." Colwell at 218. To prove a worsening of impairment, a claimant must introduce evidence demonstrating he or she has suffered "a greater loss, loss of use, or derangement of a body part, organ system, or organ function due to a condition caused by the injury." Id. As the Supreme Court noted in Colwell v. Dresser Instrument Div., supra, a worsening of impairment may not rise to the level of an increase in the claimant's permanent impairment rating. The Supreme Court also noted upon reopening, an increased impairment rating is required when alleging an increase in permanent partial disability, but it is not a requirement when alleging permanent total disability. The Supreme Court stated as follows:

> KRS 342.730(1)(b) and KRS 342.0011(11)(b) require a worker who remains partially disabled to show a greater permanent impairment rating in order to obtain a greater award. But KRS 342.730(1)(a) and KRS 342.0011(11)(c) require a worker who was partially disabled at the time of the initial award and totally disabled

> at reopening to show only that a worsening of impairment due to the injury is permanent and causes the worker to be totally disabled.

Id. at 218.

Pursuant to KRS 342.0011(11)(c), "permanent total disability" is defined in pertinent part as "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. . ." The determination of total disability, as articulated by the Supreme Court of Kentucky in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000), necessitates a weighing of the evidence concerning whether the worker "will be able to earn an income by providing services on a regular and sustained basis in a competitive economy." The Supreme Court articulated the factors an ALJ must consider in making this determination stating:

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson*, *supra*, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also

> includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. See, *Osborne v. Johnson*, *supra*, at 803.

Id. at 51.

Pursuant to KRS 342.275 and KRS 342.285, the ALJ, as the fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). In making a determination of whether a claimant is totally disabled, the ALJ may rely on the medical testimony, a worker's own testimony regarding his or her physical condition and ability to labor, or a combination of both. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). If "medical evidence clearly and unequivocally shows the actual bodily condition...lay testimony is competent on the question of the extent of disability which

has resulted from the bodily condition." Hush, supra, at 50. "'Disability is a question of fact to be determined by the Board, and we know of no rule which requires the employee to produce medical proof.'" Id. at 51. The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

The burden of proof in a motion to reopen based on a worsening of condition falls on the party seeking to increase the award. Griffith v. Blair, 430 S.W.2d 337 (Ky. 1968); Jude v. Cubbage, 251 S.W.2d 584 (Ky. 1952). In the case *sub judice*, the burden of proof was on Hollins. As Hollins was successful before the ALJ, the sole issue is whether substantial evidence supported the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Id. Although a party may note evidence that would have supported a conclusion that is contrary to

the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46, 47 (Ky. 1974).

A review of the ALJ’s determination of permanent total disability in the June 27, 2011, opinion, order, and award reveals the ALJ relied on the medical opinions of Drs. Bean and Robert Johnson and Hollins' testimony. Since we conclude substantial evidence supports the conclusion Hollins is permanently totally disabled, we affirm.

Dr. Robert Johnson filled out a Form 107-I on December 22, 2010. Dr. Johnson assessed a 22% whole person impairment rating pursuant to Table 15-3, DRE Category IV, of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). Dr. Johnson opined: "Mr. Hollins is incapable of substantial gainful activities."

The record further reveals Dr. Bean gave a sworn recorded statement on September 23, 2010, which was attached to Hollins' motion to reopen. Dr. Bean noted he performed lumbar L5/S1 surgery on Hollins on May 8, 2009, and had seen Hollins approximately five times since surgery. Dr. Bean noted Hollins still complains of pain, and his current restrictions are as follows: "I recommend lifting no more than 25 to 30 pounds; avoid frequent

repetitive lifting, bending, and twisting." In his September 23, 2010, recorded statement, Dr. Bean stated as follows:

> Q: And in your opinion would the restrictions that you have given him preclude him from doing heavy, arduous labor such as laying carpet, flooring, moving machinery associated with that profession?
>
> A: Yes.
>
> Q: Doctor, during that deposition, you also gave the opinion that within two years from the date you saw him that he ought to have reached as much improvement with functioning as he would within two years post surgery. He should have reached a true level of functioning. Based upon the medical records that I see, now he continues to take pain medication and continues to be symptomatic from time to time. Would you tell me your opinion now as to whether or not you believe him to be occupationally disabled?
>
> A: I think he has reached his maximum improvement I expect him to reach from the surgery. He is disabled for his accustomed occupation.
>
> Q: Would that also, in your opinion, disable him for any sort of manual labor?
>
> A: As I understand manual labor, yes.

In his January 20, 2011, deposition, Dr. Bean testified Hollins reached MMI in May, 2010 and has a 21% impairment rating.

Hollins was deposed on January 17, 2011. Hollins testified he currently has a lot of back pain and is required to take a lot of medication for pain management. Hollins' testimony is as follows:

> Q: That pain you talk about, is that a sharp pain or a dull pain?
>
> A: Sharp pain.
>
> Q: Is it there all the time?
>
> A: All the time.
>
> Q: Do you take medication at all at this time?
>
> A: Yes, sir.
>
> Q: What are you taking?
>
> A: Lorcet 7.5.
>
> Q: How many of those do you have to take now per day?
>
> A: Three.
>
> Q: In addition to the Lorcet 7.5, are you taking anything else?
>
> A: Neurontin 300.
>
> Q: And how many of those do you have to take a day?
>
> A: Three.
>
> Q: Anything else?
>
> A: I take three- they're muscle relaxers, but I don't know the name of them.

Q: Not Tramadol?

A: No. That's a pain medicine.

Q: Do you have them with you?

A: No.

Q: Flexeril?

A: Yeah.

Q: Is that what you take?

A: I believe that's what it is.

Q: And how many Flexerils do you take a day?

A: Three.

Q: Three Flexerils a day?

A: Yeah.

Q: Anything else?

A: No.

Q: Now, you're taking a total of roughly about nine pills a day, then?

A: Sometimes I take Advil.

Q: Plus Advil?

A: Yeah.

Q: Do you take it almost on a daily basis?

A: Yeah, I do take it daily.

Q: How many Advils a day do you take?

A: Six or eight.

> [text omitted]
>
> Q: So you take six to eight Advil plus the rest of these medications?
>
> A: Yes, sir.
>
> Q: And they don't help your pain?
>
> A: No.

At the April 26, 2011, hearing, Hollins testified the pain in his low back is there "[a]ll the time." Concerning his ability to work, Hollins testified as follows:

> Q: Now, knowing your body as you know it, Marvin, not as some doctor has told you, could you go back and do any of the jobs you've ever done in your work career?
>
> A: No. If I had, I'd be there now.

The ALJ stated in the June 27, 2011, opinion, order, and award, he was persuaded by the "combined evidence from Dr. Bean, Dr. Johnson and plaintiff that [Hollins'] condition has worsened and he is now precluded from returning to any gainful employment on a regular and sustained basis." The above-cited opinions of Drs. Bean and Johnson and Hollins' testimony constitute substantial evidence which supports the ALJ's conclusion Hollins is now permanently totally disabled. Despite Carpet Center's

arguments on appeal asserting a medical opinion is necessary on reopening to establish a worsening of condition from permanent partial to permanent total disability, Kentucky case law clearly indicates testimony from Hollins on his ability to labor comprises substantial evidence. Hush v. Abrams, supra. The record contains testimony from Hollins indicating he is currently in constant pain, despite the immense amount of pain medication he takes daily. Hollins also testified he is unable to perform any of the jobs he has ever previously performed. As noted, the record reveals, at the time of the November 3, 2009, opinion, award, and order, Hollins intended to return to work once he felt better. He did not pursue a claim for permanent total disability benefits but, rather, a claim for permanent partial disability benefits. Hollins' testimony on reopening is sufficient to support the ALJ's determination Hollins' condition has worsened and he is now permanently totally disabled.

That said, medical evidence from Dr. Johnson is also clearly supportive of the ALJ's determination Hollins is permanently totally disabled, as the ALJ may infer from the language contained in Dr. Johnson’s Form 107-I, Hollins is not capable of any gainful employment. Additionally, the ALJ found Dr. Bean's testimony regarding Hollins'

current pain symptoms to be persuasive. The ALJ also noted Hollins' educational background and work history is not compatible with most light duty positions, and Dr. Bean explicitly opined Hollins' back condition excludes him from manual labor. See Ira A. Watson Department Store v. Hamilton, supra. The evidence recited herein constitutes substantial evidence which supports the ALJ's determination Hollins' condition has worsened since the November 3, 2009, opinion, award, and order, to the extent he is now permanently totally disabled.

Accordingly, the June 27, 2011, opinion, order, and award and August 2, 2011, order denying Carpet Center's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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